92-161

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Cross-Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Cross-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is a cognizable public interest, for purposes of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552 (b)(7)(C), where (a) a plaintiff has demonstrated a nexus between FBI activity and the activity of state agencies that have engaged in unlawful activity and (b) the plaintiff wishes to learn through his FOIA request whether or not and to what extent the FBI has participated in the State wrongdoing.

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 2
STATEMENT 2
REASONS FOR GRANTING THE CROSS-PETITION .. 4
CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

Dep't of the Air Force v. Rose, 425 U.S. 352 (1976) 5

Landano v. Rafferty, 126 F.R.D. 627 (D.N.J. 1989), rev'd 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990) 1, 3

Landano v. Rafferty, 670 F.Supp. 570 (D.N.J. 1987) aff'd 856 F.2d 569 (3d Cir. 1988), cert. denied 489 U.S. 1014 (1989) 1, 2

United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) 4

STATUTES:

5 U.S.C. § 552 2

5 U.S.C. § 552(b)(7)(C) 1

28 U.S.C. § 1254(1) 1

The respondent, Vincent James Landano, hereby cross-petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Third Circuit that reversed the judgment of the district court with regard to FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).

OPINIONS BELOW

The opinion of the Court of Appeals (App.[1], 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (App., 31a-47a and 48a-61a) are reported at 751 F.Supp. 502 and 758 F.Supp. 1021. Opinions in a related habeas corpus action appear as *Landano v. Rafferty*, 670 F.Supp. 570 (D.N.J. 1987) aff'd 856 F.2d 569 (3d Cir. 1988), cert. denied 489 U.S. 1014 (1989) and *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. App., 62a-63a. The Petition for certiorari was received by the respondent on June 24, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] Unless otherwise indicated, all citations are to the Appendix annexed to the Petition by the FBI.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552 provides in pertinent part:

> (b) This section does not apply to matters that are
>
> * * *
>
> (7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> * * *
>
> (C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy.

STATEMENT

1. It is uncontroverted in the record below that there was a nexus between the FBI, on the one hand, and state prosecutive and investigative authorities who engaged in improper, unconstitutional conduct during the criminal investigation and prosecution of Mr. Landano. (App., 58a and 60a)

2. The FBI was an active participant in a team of federal, state and local prosecutors and investigators that interviewed eyewitnesses and collected and analyzed physical evidence. (Respondent's Supplemental Appendix below at SA5-SA16; *see also,* App. 2a)

3. In *Landano v. Rafferty,* 670 F.Supp. 570 (D.N.J. 1987), aff'd 856 F.2d 569 (3d Cir. 1988), cert. denied, 489

U.S. 1014 (1989) ["*Landano I*"] and *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990) ["*Landano II*"], the district court made factual findings, adopted by the district court in its FOIA decision below (App. 58a), detailing gross, unconstitutional misconduct by investigators and prosecutors in this case. The *Landano I* and *II* district court found that the government, in bad faith, suppressed exculpatory eyewitness evidence, knowingly concealed the coercion of a key witness, and impermissibly coached another witness.

4. The district court below found as fact that there existed "an investigative relationship between the ultimate prosecution of this matter and the FBI." (App. 58a)

5. The district court determined, for purposes of Exemption 7(C), that the public had a right to know, via FOIA, whether and to what extent the FBI participated in what the district court characterized as the "tainted coordinated activity" (App., 60a) of the federal/state/local team that investigated and prosecuted the case against Mr. Landano.

6. The Third Circuit, in its factual recitation, accurately states "the FBI was involved, as were New Jersey state law enforcement officials, in the investigation of the murder." (App., 2a)

7. Notwithstanding the uncontroverted factual findings of the district court concerning the nexus between the FBI and the "tainted activity" of the investigative/prosecutive team, the Third Circuit, without disturbing those factual findings, held that this case presented no cognizable public interest for purposes of 7(C) to be

balanced against privacy interests. In so ruling, the Circuit Court adopted a *per se* rule that where State wrongdoing is involved, there can be no 7(C)-cognizable public interest, ignoring the issue posed by the *nexus* between the FBI and the tainted state activity:

> Landano here paints with too broad a brush. Landano was convicted of murder in a state court. No federal prosecution ever took place in this case. Accordingly, any Brady-type wrongdoing must necessarily have involved the state prosecutors, not the FBI or federal prosecutors. To the contrary, the district court expressly found that there was no reason to believe there was any FBI wrongdoing involved in this case. Accordingly, we conclude that just as there is no FOIA-recognized public interest in discovering evidence in federal government files of a private party's violation of the law, see *Reporters Comm.*, 489 U.S. at 774, 109 S.Ct. at 1482, there is no FOIA-recognized public interest in discovering wrongdoing by a state agency.

(App., 16a)

REASONS FOR GRANTING THE CROSS-PETITION

The Third Circuit's ruling, which appears to be the first and only reported decision wherein there is an uncontroverted nexus between the FBI and state agencies engaged in misconduct, runs afoul of the holding of this Court in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). There, this

Court held that there is no FOIA-cognizable public interest, for purposes of Exemption 7(C), in discovering evidence in FBI files of criminal activities by private persons, because such evidence would shed no light on federal agency conduct. The Circuit mistakenly deduced from that principle that there is no FOIA-cognizable public interest in evidence of state governmental misconduct held in FBI files even where there is a nexus between FBI activity and the activity of state agency wrongdoers.

That holding violates the affirmative rule of *Reporters Committee* that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that [*i.e.* FOIA's] statutory purpose." *Id.* at 772. *See also, Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Where, as here, the FBI engaged in coordinated activity with state governmental authorities during the very period of their wrong-doing (60a; Respondent's Supplemental Appendix below at SA5 to SA13) and a record of that activity exists in federal agency files, release of FBI files will shed light on FBI agency conduct by exposing whether or not and to what extent the FBI participated in the state wrong-doing. In this case, the cross-petitioner's FOIA application would have shed light upon the manner in which the FBI conducted itself in a federal/state/local investigative and prosecutive team that, in bad faith, suppressed exculpatory evidence and coerced and impermissibly coached witnesses. See *Landano I* and *II*, *supra*.

The question presented here is of broad institutional importance. There is often a functional nexus between the FBI and state authorities, for example when the FBI and

state authorities work jointly to investigate interstate crime. The public has a right to know whether the FBI has joined state authorities in wrong-doing or passively condoned such activity. In this specific case, the public has an interest in knowing whether state authorities used the FBI as a repository for exculpatory materials they wished to hide.

Certiorari should be granted to decide whether under *Reporters Committee* there is a substantial public interest, for purposes of Exemption 7(C), when a FOIA applicant seeks to explore FBI conduct during coordinated activity with tainted state agencies. If certiorari is not granted, an erroneous Third Circuit ruling, deviating broadly from this Court's decisions, will serve as precedent throughout the nation, because the Third Circuit's ruling is the only published appellate opinion addressing Exemption 7(C) in the context of a federal agency harboring evidence of its relationship to wrong-doing State agencies.

CONCLUSION

For all of the foregoing reasons, the cross-petition for a writ of certiorari with respect to the Exemption 7(C) portion of the Third Circuit's judgment should be granted, whether or not the underlying Petition is granted.

Respectfully submitted,

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DATED: July 22, 1992

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In the Supreme Court of the United States

OCTOBER TERM, 1992

VINCENT JAMES LANDANO, CROSS-PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CROSS-RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under the balancing test for reviewing a federal agency's withholding of records under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552, unsubstantiated assertions of possible FBI involvement in alleged wrongdoing by state officials give rise to a qualifying "public interest" in disclosure that is sufficient to overcome acknowledged interests in personal privacy in maintaining the confidentiality of the requested records.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963)	2, 8
Burge v. *Eastburn*, 934 F.2d 577 (5th Cir. 1991)	7
Department of the Air Force v. *Rose*, 425 U.S. 352 (1976)	6
EPA v. *Mink*, 410 U.S. 73 (1973)	6
Halloran v. *Veterans Admin.*, 874 F.2d 315 (5th Cir. 1989)	5
KTVY-TV v. *United States*, 919 F.2d 1465 (10th Cir. 1990)	5
Landano v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989)	2
Landano v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990)	2-3
Landano v. *Rafferty*, 782 F. Supp. 986 (D.N.J. 1992), rev'd, No. 91-5336 (3d Cir. July 16, 1992)	3
NLRB v. *Sears Roebuck & Co.*, 421 U.S. 132 (1975)	7
SafeCard Servs., Inc. v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991)	5, 8
United States Dep't of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989)	3, 6, 7
United States Dep't of State v. *Ray*, 112 S. Ct. 541 (1991)	4, 6, 8

Cases—Continued:

Page

United States v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984) 7

Statutes:

Freedom of Information Act, 5 U.S.C. 552 2
5 U.S.C. 552(b)(6) 6
5 U.S.C. 552(b)(7)(C) 2, 3, 4, 5, 6, 8
5 U.S.C. 552(b)(7)(D) 2, 5

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BRIEF FOR THE CROSS-RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 956 F.2d 422. The opinions of the district court (Pet. App. 31a-47a, 48a-61a) are reported at 751 F. Supp. 502 and 758 F. Supp. 1021, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. Pet. App. 62a-63a. Our

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *United States Dep't of Justice* v. *Landano*, petition for cert. pending, No. 91-2054 (filed June 22, 1992).

petition for a writ of certiorari in No. 91-2054 was filed on June 22, 1992, and was received by respondent (cross-petitioner herein) on June 24, 1992. Pet. 1. The cross-petition was filed on July 23, 1992, and therefore is timely only by virtue of Rule 12.3 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The essential facts regarding the requests of respondent/cross-petitioner Landano (respondent) for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the ensuing proceedings in the courts below, are set forth at pages 2-7 of our petition for a writ of certiorari in *United States Dep't of Justice* v. *Landano*, petition for cert. pending, No. 91-2054 (filed June 22, 1992). That petition raises issues under FOIA Exemption 7(D) that are distinct from those presented in the cross-petition under Exemption 7(C). With respect to the issues raised in the cross-petition, the following additional matters are pertinent.

1. Respondent was tried and convicted of murder in state court in New Jersey. He filed a FOIA request with the Federal Bureau of Investigation (FBI) in the hope of unearthing information that would support his continuing (and so far unsuccessful) attempts to obtain post-conviction relief. The principal basis on which respondent has sought post-conviction relief has been the failure of the state prosecutors to release to him ostensibly exculpatory materials, pursuant to the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963). 91-2054 Pet. 2-3 & n.1.[2] The FBI withheld

[2] See *Landano* v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987) (denying federal habeas corpus relief), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989); *Landano* v. *Raf-*

the documents that are the subject of respondent's cross-petition for certiorari under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which protects information compiled for law enforcement purposes if its release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

In his complaint filed in this FOIA action, respondent alleged that the records he seeks would reveal a "pattern of suppression of exculpatory evidence by various prosecutors," and the "corrupt and illegal conduct of certain prosecutors and criminal investigators." Compl. ¶¶ 19, 20 (C.A. App. 16-17). He made no allegation, however, of any wrongdoing by employees of the FBI or any other federal agency. *Ibid.* The court nevertheless ordered release of the records at issue here.

In its initial analysis of Exemption 7(C), the district court did not specifically address the "public interest" in release of the documents under the test articulated by this Court in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). See Pet. App. 39a-44a. Although the court referred to "the public's interest in assuring that the innocent are not wrongfully convicted and confined," *id.* at 32a, it also stated that it made "no finding of wrongdoing on the part of the FBI in this matter," *id.* at 33a. In its later ruling, the district court stated more clearly its view that the

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ferty, 126 F.R.D. 627 (D.N.J. 1989) (granting federal habeas corpus relief), rev'd, 897 F.2d 661 (3d Cir.) (reversing for failure to exhaust state remedies), cert. denied, 111 S. Ct. 46 (1990); *Landano* v. *Rafferty*, 782 F. Supp. 986 (D.N.J. 1992) (releasing Landano on bail pending completion of state post-conviction proceedings), rev'd, No. 91-5336 (3d Cir. July 16, 1992). Respondent's post-conviction proceedings remain pending in the New Jersey courts.

"public interest" in this case is based on "prosecutorial misconduct," but reiterated that it was "not finding that the FBI had itself committed any wrongdoing." *Id.* at 58a. The court nevertheless "recognized a FOIA-based public interest in this FOIA request on account of the investigative relationship between the ultimate prosecution of this matter and the FBI." *Ibid.*

2. The court of appeals reversed the district court's judgment concerning Exemption 7(C) and sustained the FBI's withholding of the records at issue in the cross-petition. Pet. App. 4a-17a. The court of appeals began by recognizing that persons identified in FBI criminal investigative records—including suspects, witnesses, law enforcement personnel and others—necessarily have significant privacy interests in preventing disclosure of the fact of their involvement in such matters. *Id.* at 5a-9a. The court found it unnecessary to consider the strength of those privacy interests, however, because it held that, under *Reporters Committee* and *United States Dep't of State* v. *Ray*, 112 S. Ct. 541 (1991), there is no qualifying "public interest" in the release of such information. Pet. App. 9a-16a. After analyzing those two cases in detail, the court of appeals concluded that the general interest of the public "in seeing that the guilty are convicted and that the innocent are not" does not constitute the sort of "public interest" that is relevant to FOIA analysis under *Reporters Committee* and *Ray*; rather, it held that "[o]nly when the information requested reflects directly upon the way that the agency conducts business has the requester placed something on the public interest side of the balancing equation." Pet. App. 15a.

The court of appeals further noted that the district court had found no indication of wrongdoing on the

part of the FBI, and that because respondent had been tried and convicted solely in state court, "any *Brady*-type wrongdoing must necessarily have involved the state prosecutors, not the FBI or federal prosecutors." Pet. App. 16a. The court found "no FOIA-recognized public interest in discovering wrongdoing by a *state* agency." *Ibid.*

ARGUMENT

Respondent does not take issue with the court of appeals' conclusion that the various individuals named in the FBI records at issue here have a significant privacy interest in maintaining the confidentiality of the information he seeks.[3] Instead, he bases his cross-petition solely on the proposition that there is a substantial qualifying "public interest" that outweighs the invasion of privacy that would result from release of the records. The court of appeals properly rejected that argument. It recognized that a qualifying public interest under FOIA's privacy exemptions must implicate the activities of *federal* agencies, and correctly concluded that respondent's vague and unsubstantiated assertions of FBI complicity in wrongdoing are wholly insufficient for that purpose. That ruling is fully consistent with this Court's recent teachings regarding the application of FOIA Exemption 7(C), and there is no conflict among the lower courts on the issue. Therefore, although the distinct issues under FOIA Exemption 7(D) presented in our certiorari petition warrant review by

[3] That conclusion is dictated, in our view, by *Reporters Committee*, and it is fully consonant with the uniform decisions of other courts of appeals. See *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 320-321 (5th Cir. 1989); *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV* v. *United States*, 919 F.2d 1465, 1469-1470 (10th Cir. 1990).

this Court, respondent's cross-petition should be denied.

1. In two important rulings within the past four years, this Court has furnished extensive guidance regarding the application of the two FOIA privacy exemptions: Exemption 7(C) (applicable to law enforcement records), and Exemption 6, 5 U.S.C. 552(b)(6) (applicable to government records generally). In particular, the Court has clearly identified the sort of "public interest" that may "warrant" disclosure despite the existence of a significant privacy interest.

In *Reporters Committee*, which involved the application of Exemption 7(C) to FBI "rap sheets" (criminal history records), the Court explained that resolution of the public interest question "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." ' " 489 U.S. at 772 (quoting *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976)). In other words, a disclosure of information that would invade personal privacy can be warranted only if it assists members of the public "to know what their government is up to." 489 U.S. at 773 (quoting *EPA* v. *Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (emphasis omitted)). In *Ray*, the Court applied the same principle to records withheld under Exemption 6, holding that where the records are redacted to omit information identifying particular individuals, release of the redacted information is not required unless it would shed "additional light on the Government's conduct." 112 S. Ct. at 549.

2. The central holding of the court of appeals in this case under Exemption 7(C) was that, in determining whether release of the requested information would

shed light on "the Government's conduct," a court must focus solely on the conduct of the *federal* government. It correctly recognized that where, as here, a state prisoner is asserting error in his conviction in state court, any possibility of wrongdoing by state officials is irrelevant to the FOIA analysis. Pet. App. 15a-16a.[4] This holding is entirely in accord with the reasoning of *Reporters Committee* and *Ray*. Moreover, as the court below pointed out, it also is consistent with the only other reported appellate decision to address the issue subsequent to *Reporters Committee*. See Pet. App. 15a (citing *Burge* v. *Eastburn*, 934 F.2d 577, 580 (5th Cir. 1991)).

In his cross-petition, as in the courts below, respondent attempts to finesse this issue by advancing conclusory and unsupported assertions of FBI "coordinated activity" with state authorities. See Cross-Pet. 5. The court of appeals properly concluded, however, that respondent "here paints with too broad a brush." Pet. App. 16a. This Court held in *Ray* that unsubstantiated allegations of possible wrongdoing by federal agencies do not suffice to overcome privacy interests in this setting. Otherwise, the important protections afforded by FOIA's privacy exemptions would be vitiated by mere assertions by

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[4] In undertaking the public interest analysis, the court of appeals properly gave no weight to respondent's personal interest in obtaining the information in order to attack his conviction. This approach is not only dictated by the holding of *Reporters Committee* that the purposes of the individual requester have no bearing on the issue (489 U.S. at 770), but also is in accord with this Court's consistent recognition that FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984).

any member of the public. 112 S. Ct. at 549-550. In this case, there is no indication of any FBI involvement in any wrongdoing, as both courts below recognized. Pet. App. 16a, 33a, 58a. Accordingly, the court of appeals' rejection of respondent's wholly unsubstantiated theories of FBI complicity with any wrongdoing in the underlying criminal prosecution is entirely consistent with the teachings of *Ray*. Moreover, respondent has pointed to no inconsistency among the lower courts in this area. To the contrary, the D.C. Circuit has ruled that the identities of individuals named in federal law enforcement records should be protected under Exemption 7(C) in the absence of "compelling evidence that the agency is engaged in illegal activity." *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d at 1206.

In addition, as the court of appeals also pointed out, federal involvement in the particular type of wrongdoing respondent has alleged—withholding of exculpatory information in violation of *Brady* v. *Maryland*—is logically impossible here. It is the conduct of the criminal prosecution itself—which in respondent's case was undertaken solely by state officials, in state court—that triggers a defendant's right to receive (and the prosecutor's duty to furnish) exculpatory material under *Brady*. Accordingly, "any *Brady*-type wrongdoing must necessarily have involved the state prosecutors, not the FBI or federal prosecutors." Pet. App. 16a. The court of appeals therefore properly concluded that there is no qualifying public interest in the release of the information withheld by the FBI under Exemption 7(C).

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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